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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNION OIL COMPANY OF CALIFORNIA, *Petitioner*

v.

CITIZENS FOR A BETTER ENVIRONMENT CALIFORNIA, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents offer three arguments in opposition to Unocal's Petition. First, they contend that the lower court rulings that Unocal did not pay a "penalty" within the meaning of the Clean Water Act were "fact-bound" findings inappropriate for review by this Court. Whether Unocal's payment was a penalty is not a fact question, but a matter of statutory interpretation that was litigated and decided below "*as a matter of law.*" (App. 55a, emphasis added)[1]

Second, Respondents contend there is no conflict among the circuits with regard to the "comparable State law" issue because this case concerns the citizen suit bar in subsection 1319(g)(6)(A)(iii) and the First and Eighth Circuit cases addressed the bar in subsection 1319(g)(6)(A)(ii). Yet the Ninth Circuit itself openly acknowledged that its decision is at odds with those of the other two circuits. (App. 10a-12a) Moreover, the use of the term "comparable State law" in subsections (ii) and (iii) presents a "classic case" for the rule that the same words used in different parts of one statute, especially when so closely intertwined, "are intended to have the same meaning." *C.I.R.* v. *Lundy*, __ U.S. __, 116 S.Ct. 647, 655 (1996).

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[1] Respondents proffer a number of incomplete quotations from the record in an attempt to controvert the expressed understanding of the Board, the EPA and the refiners that the payment was, in legal effect, a penalty. Respondents mistakenly state that "the Regional Board held that 'it is inappropriate to characterize the payment * * * as a penalty.'" (Opp. 5) However, the record reveals that the speaker quoted by Respondents was not a Board member, but Unocal's counsel, and that the quoted language is seriously out-of-context. Unocal's counsel explained that "for practical purposes, it is, in fact, a penalty. It's viewed by EPA as a penalty in its letter. I think the Board considers it a penalty." (ER 150) As the Petition points out, the only Board member to address the issue stated: "It is penalties, that's plain and simple what it is." (ER 140)

Third, Respondents contend that this citizen suit does not supplant a State enforcement action in violation of this Court's admonition in *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987), because the Regional Board "never commenced" an enforcement action against Unocal. (Opp. 4 n.7) The record is to the contrary. The Cease and Desist Order provides: "This Order is an action to enforce the laws and regulations administered by the Regional Board." (App. 77a ¶15) Thus, the record below demonstrates unequivocally that the State did take enforcement action against Unocal.[2]

In order to make this case appear unworthy of this Court's review, however, Respondents have inaccurately characterized the settlement of the enforcement action. Specifically, Respondents incorrectly state, "Unocal sued the state to invalidate the final limits, and the agreement to settle Unocal's case against the state expressly provided that Unocal's payment was not a penalty." (Opp. 24) This Court will not find in the record that the Settlement "expressly provided" that Unocal's payment is not a penalty. The Settlement simply says the refiners will pay $2 million. (App. 83a-85a) Similarly, Respondents' suggestion that Unocal would pay $780,000 "to settle [its own lawsuit] against the state" (Opp. 1, 24) is not only counterintuitive, but also completely unsupported by the record.

The payment was made to settle the Board's enforcement action. In fact, the Settlement explicitly incorporates the Regional Board's Cease and Desist Order as "an integral part of the settlement." (App. 85a ¶5) The Board's Order made clear that its "action to enforce" was necessary because "the

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[2] Although the Board action was commenced November 9, 1993 based upon anticipated violations of the final limits effective December 12, 1993 (ER 44, 63), the final Cease and Desist Order was not filed until January 19, 1994, one month after the final limits went into effect. (App. 81a)

dischargers will not be able to achieve compliance with the selenium limits" by the December 12, 1993 deadline. (App. 71a ¶4, 77 ¶15) Indeed, Respondents acknowledge elsewhere in their Opposition that Unocal's payment was made to defer further enforcement of the final limits until 1998. (Opp. 3, 7, 10 n.13, 27-28) That admission is consistent with the conclusion that Unocal's payment was a penalty for violation of the final selenium limits. Therefore, Unocal's settlement of the State's administrative enforcement action bars this duplicative and unnecessary citizen suit.[3]

A. Unocal's settlement payment was a "penalty" as a matter of law; the issue is not fact-bound.

Respondents contend Unocal should be deprived of the benefit of the Clean Water Act citizen suit bar because the question whether Unocal paid a penalty within the meaning of the Act is "fact-bound." (Opp. 9-13) Respondents seek to characterize this issue as "factual" in the hope this Court will be unwilling to grant review if a factual dispute underlies the petition.

Whether Unocal's settlement payment to the State is a "penalty" for purposes of the citizen suit bar is a pure question of law requiring interpretation of a federal statute, 33 U.S.C. § 1319(g)(6)(A)(iii). Although Respondents assert the district court made a "factual finding that the payment Unocal made was not a penalty" (Opp. 7), the district court actually ruled that the payment "was not, *as a matter of law*,

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[3] Contrary to Respondents' contentions as to the alleged impacts of selenium on San Francisco Bay (Opp. 1), the record shows that ambient concentrations of selenium in the Bay are significantly below even the most stringent federal standards. (ER 244 ¶ 16) Moreover, selenium from all six Bay refineries collectively is "dwarfed" by other selenium sources, including agricultural runoff. *Van Scoy* v. *Shell Oil Co.*, No. C 94-3827 FMS, 1995 U.S. Dist. LEXIS 5430 at n.1 (N.D. Cal. April 18, 1995).

a penalty within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii)." (App. 55a, emphasis added) The Ninth Circuit stated that it reviewed such "questions of law *de novo*." (App. 5a)[4] Therefore, this Petition raises a pure question of law whether Unocal's $780,000 payment to the State constitutes a penalty within the meaning of section 1319(g)(6)(A)(iii), barring a citizen suit.

As discussed in the Introduction, Unocal paid $780,000 to settle the Board's "action to enforce" the final permit limit for selenium. (App. 71a ¶ 4) Under California law, the only civil monetary liability available for such a permit violation is a penalty. Cal. Water Code § 13385. Unocal's payment was therefore a penalty as a matter of law. There was nothing else it could be.

B. Subsections 1319(g)(6)(a)(ii) and (iii) are inextricably intertwined; Respondents vainly attempt to separate the two subsections solely to avoid the circuit conflict which the Ninth Circuit itself acknowledged.

In the hope of avoiding review by this Court, Respondents deny the existence of a circuit conflict (Opp. 15) that even the Ninth Circuit opinion acknowledged and addressed. (App. 10a-12a) Specifically, Respondents contend there is no conflict among the circuits because the First and Eighth Circuits interpreted the "comparable State law" provision in subsection (ii) while the Ninth Circuit

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[4] Since this case arises from a Rule 12(b) motion to dismiss, the lower courts did not and could not make the four "findings of fact" claimed by Respondents. (Opp. 10-13) Rather, these were subsidiary issues of law underlying the "penalty" issue. Further, contrary to Respondents' assertion (Opp. 10), Unocal has consistently argued as it did in its opening brief in the Ninth Circuit that, "[a]s a matter of law, the payment required by the Regional Board was a 'penalty.'" (AOB 21-26)

construed subsection (iii) of section 1319(g)(6)(A). (Opp. 7-18)

Respondents do not suggest that the words "a State law comparable to this subsection" in (ii) mean something different from the words "such comparable State law" in (iii). The use of the word "such" in subsection (iii) plainly establishes that Congress intended the same meaning in both subsections. *United States* v. *Bowen*, 100 U.S. 508, 512 (1880) (the qualifying word "such" refers to words in the immediately preceding sentence of the statute). The "interrelationship and close proximity of these provisions" present a "classic case for applying the normal rule" that "identical words used in different parts of the same act are intended to have the same meaning." *C.I.R.* v. *Lundy*, 116 S.Ct. at 655.

The First and Eighth Circuits held that "comparable State law" refers to the State's statutory enforcement scheme *as a whole* rather than the specific State law section cited by the agency in support of its enforcement action. *North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552, 556 (1st Cir. 1991); *Arkansas Wildlife Fed'n* v. *ICI Americas, Inc.*, 29 F.3d 376, 381-382 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1094 (1995). In contrast, the Ninth Circuit held that "comparability" is determined by examining the precise statutory section cited by the State as the basis for its action, and that any penalty paid must be explicitly assessed under the penalty provision of State law that exactly mirrors the federal administrative penalty provision found in section 1319(g). (App. 12a)

Thus, there is a direct conflict among the circuits. Review by certiorari is warranted to overturn the Ninth Circuit's narrow approach, which requires not only that cases like this one turn on the State's formal, explicit recital of the source of its enforcement power, but also that such recital exactly mirror section 1319(g). Because the legal terminology may vary from state to state, and the substance

of the California enforcement action here included a penalty payment through settlement, "it would seem overly formalistic" to accord "significance to the presence or absence of an explicit reference." *Scituate*, 929 F.2d at 559 (concurring opinion).[5]

Under the First and Eighth Circuit decisions, the settlement payment would be considered a penalty paid under a "comparable State law." Certiorari is therefore justified to resolve the conflict by reversing the Ninth Circuit decision, which serves only to "balkanize" the application of the federal statute.[6]

C. Contrary to Respondents' theory, the Ninth Circuit decision conflicts with the admonition in *Gwaltney* that citizen suits should not supplant governmental action.

Respondents protest at length that the Ninth Circuit's ruling is consistent with this Court's decision in *Gwaltney*, 484 U.S. 49, and will not allow citizen suits to interfere with government enforcement of the Clean Water Act. (Opp. 19-22, 23-28) Respondents' contention is premised entirely on

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[5] As Respondents acknowledge (Opp. 6), the Regional Board considered a variety of enforcement options, including "imposition of an administrative penalty." (App. 77a ¶14) Because payment of a penalty had been achieved through negotiation, the Board concluded a formal penalty action was not required and instead took enforcement action by "settlement of the litigation and issuance of a cease and desist order." (*Id.*)

[6] Respondents also assert that the defendant in the Eighth Circuit case "sought to preclude a citizen suit" only under subsection (ii). (Opp. 14) In fact, the defendant "filed a motion for summary judgment on grounds that AWF's suit was jurisdictionally barred under 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii)." *Arkansas Wildlife*, 29 F.3d at 378.

their assertion that the Regional Board did not take enforcement action or collect a penalty.

As explained above, the record shows that the Board itself described its Order as "an action to enforce" the final selenium limit. (App. 71a ¶4, 77a ¶15) Moreover, as also discussed above, Unocal's $780,000 settlement payment was a penalty for violation of the final limit. As a matter of law, there was nothing else it could be. Cal. Water Code § 13385.

Further, if Respondents were correct that the settlement here does not preclude a citizen suit, then the district court would have jurisdiction to impose penalties and grant injunctive relief. However, this Court stated in *Gwaltney* that where the government has either accepted an amount in settlement, or even agreed to forego penalties, a subsequent citizen suit for penalties undermines the enforcement discretion of the EPA and the State. *Gwaltney*, 484 U.S. at 61. It would be entirely inappropriate in circumstances like these, where $780,000 has already been paid, for a district court to impose any penalty. Similarly, a district court would need a powerful justification for granting injunctive relief inconsistent with that already ordered by the State and for requiring compliance with a discharge limit that the State regulators had concluded cannot be met with existing technology. (App. 73a)[7]

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[7] Respondents questioned Unocal's inability to meet the final selenium limits when three other refiners were able to do so. (Opp. 3 n.5) The Board rejected Respondents' claim, finding that the three refiners used different crude oil supplies and different processing methods not feasible for Unocal, Exxon or Shell. (ER 156-157) The Board also found it undisputed that there was "no known technology" for Unocal, Exxon or Shell to meet the limits. (App. 72a-73a) Shell did enter into a consent decree in another case to meet the final limit, but Respondents fail to disclose (Opp. 3 n.5) that the decree set the same July 31, 1998 deadline that the Board set for Unocal. (Plaintiffs' RJN 31)

If Respondents questioned the sufficiency of the amount paid by Unocal or the terms of the Cease and Desist Order, their remedy was to pursue administrative and judicial review under California law. Their remedy was not to file a citizen suit seeking to have a federal district court redetermine the issues resolved by the expert State regulators.

Because the Ninth Circuit is in direct conflict with *Gwaltney* in allowing a citizen suit where the State agency has already taken corrective enforcement action, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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